United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

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P/S

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1083

LENIN ENCISO-CARDOZA, EDWIN MICHAEL ENCISO, Minor,

Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1083

LENIN ENCISO-CARDOZA, EDWIN MICHAEL ENCISO, Minor,
Petitioners,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

RESPONDENT'S BRIEF

Statement of the Issue

Whether the denial of a motion by a United States citizen child to intervene in the deportation proceedings instituted against his alien parent is violative of the child's constitutional right to due process.

Statement of the Case

The petitioners, Lenin Enciso-Cardozo, an alien, and Edwin Michael Enciso, her United States citizen child, petition this Court for review of an order entered by the Board of Immigration Appeals on September 28, 1973. In that order the Board dismissed the petitioners' appeal from an order of an Immigration Judge which found the alien petitioner deportable and which denied the motion of the alien's citizen child to intervene in the deportation proceeding instituted against his parent.

This Court has jurisdiction under Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a.

Statement of Facts

The petitioner, Lenin Enciso-Cardozo, is a married female alien, a native and citizen of Mexico. She entered the United States on November 2, 1970 as a nonimmigrant visitor for pleasure and was authorized to remain in the United States until November 2, 1971. On September 18, 1971 she married Eduardo Enciso-Cardozo, also a native and citizen of Mexico, in New York City.

The alien petitioner failed to depart from the United States by November 1, 1971 and remained in this country without authority beyond that date. On November 27, 1972 she gave birth to a United States citizen child, Edwin Michael Enciso, who joins with his mother in this petition for review.

On February 19, 1973 the alien petitioner voluntarily surrendered herself to the Immigration and Naturalization Service (the "Service"). Deportation proceedings were instituted against her on that date by the issuance of an order to show cause and notice of hearing (T. 12).* At the deportation hearing held on February 26, 1973, the alien petitioner conceded the truth of the allegations in the order to show cause but did not concede deportability. The Immigration Judge found the alien petitioner to be deportable and by order dated February 26, 1973 she was ordered deported to Mexico and by the same order the motion of the alien's citizen child to intervene in the deportation proceeding was denied. The Immigration Judge further ordered that the alien be granted the privilege of

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* References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record filed with the Court.

voluntary departure provided she depart from the United States prior to May 26, 1973 (T. 10).

By a Notice of Appeal dated March 2, 1973 the petitioners appealed the decision of the Immigration Judge to the Board of Immigration Appeals (the "Board"). By order dated September 28, 1973 the Board dismissed the appeal and granted the alien 89 days in which to voluntarily depart from the United States. The Board further ordered that in the event the alien failed to depart within that time she be deported to Mexico (T. 2).

At the request of the alien the Service granted her an extension of her voluntary departure date to January 24, 1974. On January 23, 1974 this petition for review was filed and the alien petitioner thereby obtained an automatic stay of deportation pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

ARGUMENT

POINT I

The Rights Of An Infant Citizen To Due Process Are Not Violated By Denying His Motion To Intervene In The Deportation Proceedings Instituted Against His Alien Parents.

The petitioners do not seek to review the final order of deportation insofar as it is based on a finding that Lenin Enciso-Cardozo, the alien petitioner, is deportable. Indeed, there is no question but that the alien is deportable pursuant to Section 241(a)(2) of the Act, 8 U.S.C. § 1251 (a)(2). Rather, the petitioners contend that the infant citizen should have been permitted to intervene in the deportation proceeding instituted against the alien petitioner, his mother. The petitioners contend that the denial of the

infant citizen's motion to intervene constituted a denial of the infant's right to due process.

The infant petitioner argues that his rights as a United States citizen can be protected only by permitting him to intervene in his parents' deportation proceedings. The courts have consistently rejected the argument that a citizen spouse or a citizen child should be permitted to intervene in deportation proceedings pending against alien relatives. The argument has been raised in several different procedural contexts and has been uniformly rejected in each.

In *Agosto* v. *Boyd,* 443 F.2d 917 (9th Cir. 1971), the citizen wife and minor children of an alien against whom deportation proceedings were pending sought an order permitting them to intervene in the deportation proceeding. The court held that relatives of aliens do not have standing to intervene in pending deportation proceedings and stated that there is "neither statutory nor decisional authority permitting district courts to entertain actions by the relatives of aliens to intervene in pending deportation proceeding." *Id.* at 917. Although the district court found that it had jurisdiction to hear a declaratory judgment action by an infant citizen seeking to stay the deportation of his alien parents in *Application of Amoury,* 307 F. Supp. 213 (S.D.N.Y. 1969), the court also held that the infant's right to due process was not violated by the deportation order against his parents. The court reasoned that since the deportation proceeding was not predicated upon any charge with respect to the infant he was not entitled to notice or a hearing with respect to the charge against his parents. While recognizing that the citizen child would undoubtedly be affected by enforcement of the deportation order entered against his parents, the court held that procedural due process need not be accorded those who may be affected by the final result of proceedings against an alien parent.

In *Silverman* v. *Rogers*, 437 F.2d 102 (1st Cir. 1970), a United States citizen and his alien wife sought to enjoin commencement of deportation proceedings against the wife on the theory that to refuse the wife the right to reside in the United States would deprive both parties of their constitutional rights. The court easily rejected that contention stating that the alien wife enjoys no special right to remain in the United States since Congress has discretion to place conditions on her right of entry or continued residence.

Likewise, *Swartz* v. *Rogers*, 254 F.2d 339 (D.C. Cir. 1951), was an action by an alien husband and his citizen wife for a declaratory judgment and for injunctive relief from the deportation order entered against the husband. The court in *Swartz* saw the issue as whether the citizen wife's marriage to her alien husband in 1942 gave her a contract right or a marital status which is so protected by the due process clause of the Fifth Amendment that her husband could not be deported by the retrospective application of a new statute. While recognizing that the husband's deportation would put a burden upon the marriage, the court pointed out that the deportation would in no way destroy the legal union which the marriage created. The court held that under the circumstances the wife had no constitutional right which would be violated by the husband's deportation.

The petitioners have raised their challenge to the constitutionality of the deportation proceeding which prohibits intervention by a citizen child of the deportable alien in a novel way. They do not argue that a deportation order against the parents of a citizen child deprives the child of a constitutional right. That argument has been raised and rejected in other cases. *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957); *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Mendez* v. *Major*, 340 F.2d 128 (8th Cir. 1965).

Instead, like the infant citizen in the *Amoury* case, the petitioners contend that the citizen child has been denied *procedural* due process since his motion to intervene was denied. However, as the court in *Amoury* stated, the infant citizen petitioner was not the subject of the deportation proceedings and he was not entitled to either notice or a hearing with respect to the alleged deportability of his parents.

The petitioners' argument that enforcement of the deportation order against the alien parents of a minor citizen child will either result in separation of the family or in the enforced departure of the child from the country of his birth has been rejected by this Circuit in *Faustino* v. *Immigration and Naturalization Service*, 432 F.2d 429 (2d Cir. 1970). Although the petitioner in *Faustino* questioned the constitutionality of Section 201(b) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b), insofar as it limited the exemption from the numerical limitation of § 201(a) of the Act, 8 U.S.C. § 1151(a) to parents of children at least twenty-one years of age, this Court unequivocally endorsed the views of the Fifth Circuit in *Perdido* v. *I.N.S.*, 420 F.2d 1179 (5th Cir. 1969). In *Perdido*, the court recognized that a minor child "who is fortuitously born here" has not exercised a deliberate decision to make this country his home. Since minor children do not normally determine the location of the family home, the court held that Congress had recognized a rational distinction when it limited the category of those who could confer immigration benefits on their parents to persons over twenty-one years of age. While the constitutional issue raised in both *Faustino* and *Perdido* was not the same issue raised here, the courts impliedly rejected the very issue raised here, *i.e.*, the right of the citizen child to intervene in the parents' deportation proceeding.

POINT II

The Deportation Proceeding Is Not The Proper Forum To Protect The Rights Of The Citizen Child.

Both petitioners and amicus argue that the deportation proceeding is the forum wherein the citizen child's rights can be fully and fairly considered. In its brief, amicus cites two factors upon which the child's need for an independent voice in his parents' deportation proceeding rest. The first factor pointed to is that the interests of parents and children do not necessarily coincide. As an example, amicus argues that if an alien parent is deported for child abuse the infant citizen who is not permitted to assert its own interests at the parent's deportation hearing may be obliged to accompany the abusing parent. Assuming, *arguendo,* that an alien parent would be deportable for child abuse, the argument advanced by amicus is one which totally disregards the purpose and scope of the deportation hearing. Amicus would have the Immigration Judge who conducts the deportation proceeding also sitting as a guardian of the citizen child's safety. Even if the child were heard in the deportation proceeding and requested either that he be permitted to remain in the United States with relatives or be assured of safekeeping in the country of destination, the Immigration Judge has absolutely no authority to grant either relief. Section 242(b) of the Act clearly limits the jurisdiction of the Immigration Judge to conducting "proceedings . . . to determine the deportability of any alien. . . ." 8 U.S.C. § 1252(b). Clearly, there is no jurisdiction granted to the Immigration Judge to make any findings or to issue any orders with respect to a citizen.

The second factor which amicus points to as requiring that the child be permitted to intervene in the parents' deportation proceeding is that there may be facts or issues which the child might raise that the parent, either intentionally or through oversight, did not raise. As an ex-

ample, amicus contends that the alien petitioner failed to request a discretionary stay of deportation as the parent of a United States citizen, although Service policy provides that alien parents of citizen child born subsequent to May 1, 1970 shall not be granted stays of deportation solely because of the family relationship but the alien must show some other compelling factor to stay deportation.

It is submitted that the argument advanced by amicus on this factor is a specious one. First, the request for a stay of deportation is directed to the District Director and not to the Immigration Judge. 8 C.F.R. § 243.4. Secondly, the argument made by amicus is self-defeating. In the deportation proceeding the alien parent *and* the citizen child were, in fact, both represented by the same attorney. To argue that discretionary relief could have been applied for had the citizen child been permitted to intervene seems to beg the question. If the attorney would have made the application on behalf of the child, had the child been permitted to intervene, what prevented him from making the application on behalf of the alien parent?

It is submitted that the emphasis put by amicus on the separability of interests of the parent and child is unrealistic. If there are such divergent interests between the parent and child, as where the parent has physically abused the child, what reason is there to believe that a young child would secure representation in his own behalf. It is difficult to believe that the abusing parent would retain independent counsel for the child and it is even more difficult, if not impossible, to believe that a 2 or 3 year-old child would be able to obtain independent representation himself.

Respondent's arguments are to the effect that the administrative agency is the proper forum for the citizen child to be heard and that such intervention permits meritorious cases to be granted appropriate discretionary relief. Specifically, respondents contend that substantial

relief would have been granted if the infant had been permitted to intervene. However, the alien parents were, in fact, granted the only discretionary relief to which they were entitled.

If the respondent's position is followed to its logical conclusion, deportation proceedings could become a forum for the litigation of all types of claims against aliens which are totally unrelated to that issue which is and should be the sole issue in a deportation proceeding: is the alien in fact deportable. For example, the former wife, who is a citizen, of a deportable male alien may seek to intervene in order to insure that she will continue to receive alimony and child support payments. The aging citizen parents of a deportable alien adult son or daughter may seek to intervene on the theory that they are in need of the child for support and/or companionship. Such a use of the deportation procedure was not intended by Congress and should not be upheld by this Court.

POINT III

The Infant Citizen's Right To Remain In the United States Does Not Override The Fact That His Parents Are Deportable Aliens.

Although the petitioners' argument seems to be concerned solely with the procedures of the deportation process, in essence their position is that the right of the citizen child to remain in the United States is such as to override the deportability of his parents. The power of Congress to decide the conditions under which the child's alien parents may enter and remain in the United States is plenary and unfettered. *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Hitai* v. *Immigration and Naturalization Service*, 343 F.2d 466 (2d Cir. 1965), *cert. denied*, 382 U.S. 816. The courts have carefully adhered to this proposition even

though the conditions imposed may cause a certain amount of hardship upon an alien's citizen children or other relatives. *Mendez* v. *Major, supra; Swartz* v. *Rogers, supra; Papageorgiou* v. *Esperdy,* 212 F. Supp. 874 (S.D.N.Y. 1963).

In *Papageorgiou* v. *Esperdy, supra,* Judge Weinfeld noted that the power of Congress to decide the conditions under which the alien may enter and remain in the United States is beyond challenge, and that where the provisions of various immigration acts work a hardship upon the alien's relatives, Congress has provided certain ameliorative sections. See, *e.g.,* Section 244 of the Act, 8 U.S.C. § 1254. Although Congress was clearly aware of the fact that citizen children are frequently born to alien parents who either at that time are or subsequently become deportable, there is no ameliorative provision in the statute granting relief to the alien parents. In fact, the legislative history of Section 201(b), although that section is not in question here, leaves no doubt that Congress intended to prevent the very result which the petitioners seem to desire. By providing that only children over 21 years of age could confer an immigration benefit in terms of exemption from numerical limitations on their alien parents, Congress sought to prevent the circumvention of this country's immigration laws.

Since the alien petitioner is a native of Mexico, she must await the issuance of a visa from the pool of visas allocated to Western Hemisphere natives. However, as the mother of a citizen child, she is exempt from the labor certification requirements of Section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14). Thus, the alien petitioner, who unquestionably was in the United States in an illegal status at the time of her child's birth, still derives some benefit from the citizenship of her child. The infant citizen, whose birth in the United States and consequent citizenship was a

fortuitous but direct result of his alien parents' flouting of this country's immigration laws, cannot now seek to override the Congressional direction that his parents be deported, despite the hardship to him, especially in view of the fact that Congress has not seen fit to provide any relief for the citizen child.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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poses and says that she is employed in the Office of the
ited States Attorney for the Southern District of New York.

That on the 29th day of August 19 74 she served ~~a copy~~ two copies of the within

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